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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-366

FRANK AGOST AND JUANITA AGOST,

Appellants,

v.

THE STATE OF IDAHO,

Appellee

ROLAND NEWLAN AND FRANCES NEWLAN,

Appellants,

v.

THE STATE OF IDAHO,

Appellee

and

THELMA SCHWARTZ as Administratrix of the Estate of Frank Harrison and Patricia Rippee and Michael Harrison Rippee, respectively; and THE ALL-STATE INSURANCE CO., Inc.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

MOTION TO DISMISS OR AFFIRM BY STATE OF IDAHO

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Pursuant to U.S. Supreme Court Rule 16 this Motion to Dismiss or Affirm is filed on behalf of the State of Idaho.

I.

STATEMENT OF THE CASE

Appellants-Petitioners Agost and Newlan (hereinafter "Appellants") have filed a Notice of Appeal to the Supreme Court of the United States seeking review of a decision of the Idaho Supreme Court upholding the constitutionality of a state statute. Appellants seek review pursuant to 28 U.S.C. §1257 (2). Accordingly, Appellants have filed their JURISDICTIONAL STATEMENT pursuant to U.S. Supreme Court Rule 15.

Appellee-Respondent State of Idaho (hereinafter "Appellee") seeks to have said appeal dismissed or, in the alternative, the decision of the Idaho Supreme Court affirmed. The basis and grounds for seeking dismissal or affirmation are as follows:

A. The Appeal should be dismissed for the failure of Appellants to conform to Rule 15.

B. The Appeal should be dismissed since the decision of the Idaho Supreme Court does not present a substantial Federal question and/or that said decision rests on an adequate non-Federal basis.

C. The Appeal should be dismissed since the question of procedural due process of law was not timely or properly raised nor expressly passed upon by the Idaho Supreme Court.

D. The Appeal should be dismissed or the decision below affirmed because said decision involved the interpretation and application of a state statute unique to the State of Idaho and upon various questions of fact associated with the interpretation and application thereof.

II.

STATEMENT OF FACTS

The undisputed facts of this case are that Appellants failed to present or file a Notice of Claim with the State of Idaho within 120 days after their respective causes of action arose.

The Newlan Claim was filed by Appellants for the death of their daughter in an automobile accident which occurred on June 1, 1971. The daughter died on June 5, 1971. The claim was presented and filed on May 24, 1973; 719 days after the date of death or 599 days after the 120-day statutory period required by Idaho Code (hereinafter "I. C.") §6-905.

The Agost Claim was filed by Appellants for the death of their son in an automobile accident which occurred on July 31, 1972. The claim was presented and filed on May 23, 1973; 296 days after the date of death and 176 days after the statutory 120-day period.

Additional significant facts regard the status of Appellants' capability to timely present and file a Notice of Claim, to-wit:

(1) Appellants were mature and responsible adults throughout the statutory period;

(2) Appellants were under no physical or mental disabilities which would mitigate their duty to timely present and file a notice;

(3) Appellants were not unavailable or absent from the State of Idaho so as to create logistical difficulties to timely present and file a claim;

(4) The period of delinquency was not short, but exceeded by a minimum in excess of five months, the four-month statutory period;

(5) Both claims when presented and filed sought specific amounts of damages; and

(6) Both claims alleged specific theories of liability based upon the slippery and slick condition of the highway and a failure to warn.

Moreover, the facts of both cases indicate that any investigation conducted at the scenes of the respective accidents were conducted for statistical purposes and pursuant to State Law and not to establish or evaluate a potential cause of action against the State of Idaho.

III.

COURSE OF PROCEEDINGS

These consolidated cases came to the Idaho Supreme Court on orders from two district courts dismissing the respective cases for lack of jurisdiction because of Appellants' failure to timely present and file a claim as required by I. C. §6-905. Appellants attacked the constitutionality of said statute. Said challenge was briefed and argued in both the trial courts and Su-

preme Court of Idaho on the ground that said statute was in violation of the Equal Protection Clause of the Fourteenth Amendment. The decisions of the trial courts as well as the decision of the Supreme Court of Idaho affirmed the constitutionality of said statute as not violative of the Equal Protection Clause. The question of procedural due process of law was not properly raised, briefed or argued in any of the Idaho courts, nor did any of the Idaho courts evaluate or pass upon the constitutionality of I. C. §6-905 from the standpoint of procedural due process of law.

IV.

APPELLANTS HAVE FAILED TO TAKE THEIR APPEAL IN CONFORMITY WITH U.S. SUPREME COURT RULE 15

The JURISDICTIONAL STATEMENT filed by Appellants pursuant to direct appeal under 28 U.S.C. §1257 (2) is inadequate and incomplete. U.S. Supreme Court Rules 15 (a), (h) and (i), require an appellant to append a copy of any opinion, order, judgment or decree appealed from. Accordingly, Appellants have appended the Idaho Supreme Court decision (535 P.2d 1348) and the Memorandum of Decision and Order of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls, in *Newlan v. State of Idaho*. However, Appellants have failed to include in their Appendix the Order Granting Motion to Dismiss and Judgment on Order rendered by the District Court of the Second Judicial District

of the State of Idaho, in and for the County of Clearwater, in *Agost v. State of Idaho.*

Appellants' failure in this regard is in violation of the specific and mandatory requirement of Rule 15 and therefore presents a ground upon which this Appeal can be dismissed pursuant to Rule 16 (1) (a).

V.

APPELLANTS DID NOT TIMELY OR PROPERLY RAISE AND PRESENT NOR DID THE IDAHO COURTS PASS UPON ANY PROCEDURAL DUE PROCESS OF LAW QUESTION

Appellants present a procedural due process of law issue as their third question in their JURISDICTIONAL STATEMENT. However, a thorough review of the record below in the Idaho trial courts and the Supreme Court fails to reveal any presentation and consideration of any issue concerning procedural due process of law. The Idaho Supreme Court did not pass upon the constitutionality of I. C. §6-905 from the standpoint of procedural due process of law. Indeed, the Court summarized the challenge of Appellants as follows:

> "They challenge first the constitutionality of the above statute on Equal Protection grounds and further argue that even if constitutional, this statute does not mandate dismissal under the facts of the cases." 535 P2d at 1350.

Moreover, a review of the Memorandum Decisions and Orders of the Idaho District Courts does not disclose procedural due process as a ground upon which Appellants challenged the constitutionality of I. C. §6-905. A review of the Briefs submitted by Appellants in these courts also substantiates the fact that the thrust of their constitutional attack was under the Equal Protection Clause.

The United States Supreme Court has consistently refused to consider any grounds of attack not raised or decided in the state courts where the constitutionality of a statute has been upheld by those courts. In so holding, the Court has stated:

> "In the exercise of our Appellant jurisdiction to review the actions of state courts, we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly, the erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there have been abandoned." *McGoldrick v. Compagnie Generale Transatlantique,* 309 U. S. 430, 60 S. Ct. 670 (1940).

Indeed, the Court has consistently held that when the highest state court has failed to pass upon a particular question or issue it will be assumed that it is due to want of proper presentation in that court. *Street v. New York,* 394 U. S. 576, 89 S. Ct. 1354 (1969). Appellants' attempt to raise the issue of procedural due process of law in their Petition for Rehearing is not a timely presentation, particularly

where said Petition for Rehearing was denied without opinion. *Hanson v. Denckla*, 357 U. S. 235, 78 S. Ct. 1228 (1958); *Radio Station WOW v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475 (1945).

Specifically, the Court has refused to consider a procedural due process of law attack on the constitutionality of a state statute when said question had not been presented or ruled upon by a state court. *Pickering v. Board of Education*, 391 U. S. 563, 88 S. Ct. 1731 (1968); *Fuller v. Oregon*, 417 U. S. 40, 94 St. Ct. 2116 (1974).

Thus, pursuant to Rule 16 (1) (b), Appellants' Appeal should be dismissed insofar as they seek to challenge the constitutionality of I. C. §6-905 on the basis of procedural due process of law.

VI.

IN THE EVENT THIS COURT ENTERTAINS THE QUESTION OF PROCEDURAL DUE PROCESS OF LAW, IDAHO CODE §6-905 IS NOT VIOLATIVE THEREOF BY VIRTUE OF IDAHO CODE §6-907.

In the event this Court should determine that it will consider a challenge to I. C. §6-905 upon grounds of procedural due process of law, this Court should be aware of other provisions in the Idaho Tort Claims Act which mitigate the alleged "harsh effects" of the Notice of Claim requirement. In particular, I. C. §6-907 allows the filing of a claim by an agent or attorney in order to mitigate the "harsh effects" of requiring that the claimant alone file such a claim. I. C. §6-907 states in pertinent part that:

> "If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the State and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact mislead to its injury thereby."

This statute provides a means of filing a claim within the statutory period in the face of possible disabilities or infirmities. Further, this statute allows great flexibility in the substance and contents of a claim. The effect of the filing and contents requirement of this statute is to mitigate the "harsh effects" of the jurisdictional nature of a timely presentment and filing required by I. C. §6-905. Under the circumstances, this certainly meets the procedural due process challenge of Appellants as outlined in their JURISDICTIONAL STATEMENT. Moreover, the facts of these cases do not present any mitigating circumstances under which Appellants can effectively claim "harsh effects" because of their inability to timely file a claim. Their failure is simply one of neglect. The mitigating effect of these parts of I. C. §6-907 have recently been recognized as adequate by the Idaho Supreme Court in the case of the *Independent School District of Boise City v. Callister*, No. 539 P. 2d 987 (Id. 1975).

VII.

THESE CASES DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS SINCE THE JUDGMENTS AND DECISIONS BELOW REST ON ADEQUATE STATE GROUNDS.

Appellants seek to substantiate the jurisdiction of this Court on the assumption that an Equal Protection challenge to a State statute is an inherently sufficient Federal question to warrant the jurisdiction of this Court. However, Appellants have overlooked the fact that the decision of the Idaho Supreme Court rests upon an inadequate non-Federal basis.

The Idaho Supreme Court not only sustained the constitutionality of I. C. §6-905 but affirmed its interpretation and application as a matter of statutory construction, legislative pre-emption and as a question of fact, not law.

Appellants have relied upon a decision by the Nevada Supreme Court in *Turner v. Staggs*, 510 P. 2d 879 (Nev. 1973). This Court has denied a Petition for Writ of Certiorari in said case because it appeared that the judgment rested upon an adequate state ground. (*Clark County v. Turner*, 414 U.S. 1079 94 S.Ct. 598.)

A review and comparison of the various tort claims acts enacted by various states reveals substantial variety and lack of uniformity. Among state tort claims acts there is substantive similarity but procedural diversity. The state tort claims acts have different requirements for the contents of a claim, the time

for filing such a claim and who must file a claim. For example, the Michigan and Nevada Tort Claims Acts require that a notice of claim be filed only by the claimant or injured person. This is considerably different than the Idaho Tort Claims Act which allows considerable flexibility as to who can file a claim. See I. C. §6-907.

The constitutionality of the notice of claim requirement of a tort claims act depends in large part upon its interpretation and application in light of other requirements of the particular state tort claims act. The constitutionality of a notice of claim provision cannot be analyzed in a vacuum; it depends upon the contextual construction of a state statute.

The Idaho Supreme Court recognized the legislative preemption and dominance in the regulation and control of governmental liability in the State of Idaho. Following the guidelines of *Smith v. State*, 473 P. 2d 937 (Id. 1970), and its progeny, the Idaho Supreme Court reemphasized that the qualification of governmental liability was a legislative *not* a judicial function. This is in accordance with the action of many other state courts in recognizing the substantive and procedural qualification of governmental liability by the legislature. Particular reference here is to developments in the State of California after *Muskopf v. Corning Hospital District*, 11 Cal. Rptr. 89 (Cal. 1961) and the reaction of the Michigan State Legislature to *Reich v. State Highway Department*, 194 N.W. 2d 700 (Mich. 1972). This area of governmental liability is replete with examples of judicial acquiescence to

legislative preemption. In this regard, there is an adequate state basis for the decision of the Idaho Supreme Court to uphold the interpretation and application of I. C. §6-905.

Moreover, the interpretation and application of I. C. §6-905 is largely a question of fact. Appellants seek to challenge said statute on the grounds that there is not a substantial factual basis to uphold the constitutionality of the notice of claim requirement. This is the issue of factual notice versus statutory notice and the relationship of the notice of claim requirement to its alleged purposes and justifications. These are questions of fact decided by the courts below after a careful review of all of the pleadings, depositions and affidavits presented by the parties.

The rule is well settled that the decision of a state court upon questions of fact ordinarily cannot be made the subject of inquiry in the United States Supreme Court. *Missouri v. K. & T. R. Co. v. Haber*, 169 U.S. 613, 18 S. Ct. 488 (1898). The United States Supreme Court does not reopen for reconsideration questions of fact previously determined by state tribunals. *Wolfe v. North Carolina*, 364 U.S. 177, 80 S. Ct. 1482 (1960).

The question of whether there was actual notice is clearly a question of fact resolved against Appellants by both the trial courts and the Idaho Supreme Court. The issue of whether there was a reasonable relationship between the purposes of the notice of claim requirement and the facts below was a question of fact decided against Appellants by those courts. These issues should not be reconsidered by this Court since

there is adequate support and justification for the conclusions reached by the Idaho Courts in ruling against Appellants on these points.

However, if this Court should wish to consider and reanalyze whether there was a reasonable relationship between the purposes of the notice of claims statute and the subject cases, this Court should be made aware of the fact that the limitations of *Jorstad v. City of Lewiston*, 456 P. 2d 766 (Id. 1969), so heavily relied upon by the Appellants, has not only been distinguished by the Idaho Supreme Court but expressly overruled in the recent decision of the *Independent School District of Boise City v. Callister, supra.*

Morever, the Idaho Supreme Court relied upon a wider range of legitimate reasons for purposes for the statutory requirement of notice than were presented in the *Jorstad* case. In relying upon *Cook v. State*, 521 P.2d 725 (Wash. 1974), the Idaho Supreme Court recognized the inherent dissimilarity between a governmental tort-feasor and a private tort-feasor.

> "The state and its political subdivisions with the multitude of departments, agencies, officers and employees and their diverse and widespread activities, touching virtually every aspect of life within the state, render the state and its subdivisions *inherently different* from any ordinary private tort-feasor. Public funds as opposed to private funds are involved. The number of claims against governmental agencies are vastly greater than against any individual private tort-feasor. An ordinary private tort-

feasor is normally immediately aware of an incident involving potential liability, whereas the claim filing statute is usually the only sure and certain means by which the state or its subdivisions may be alerted to potential liability arising from a governmental activity." *Newlan v. State, supra,* 1351-1352, *Cook v. State, supra,* 728.

The Idaho Supreme Court also adopted the reasoning of *Robert v. State,* 114 Cal. Rptr. 518 (Cal. App. 1974), which recognized that a legitimate reason for a notice of claim requirement was to provide an opportunity for the governmental entity to rectify promptly a condition that resulted in injury and thereby prevent further losses and minimize potential liability exposure. In *Lunday v. Vogelmann,* 213 N.W. 2d 904 (Iowa, 1973), the Idaho Supreme Court found a further legitimate basis for the notice of claim requirement in protection of the public treasury and preservation of the fiscal integrity of a governmental entity.

An analysis of this case from the full range of legitimate governmental interests in a notice of claim provision provides an adequate basis upon which to affirm the decision of the Idaho Supreme Court that there was a legitimate governmental interest in the existence of a notice of claim requirement.

This Court should affirm the Idaho Supreme Court because the decision below turned essentially on questions of fact which were decided without an abuse of discretion or clear error. These questions were analyzed and decided in the context of the particular facts

of the case, the peculiarities of the Idaho Tort Claims Act, and the full range of governmental interests in having a notice of claim requirement.

VIII.

THE IDAHO SUPREME COURT APPLIED THE PROPER EQUAL PROTECTION ANALYSIS OF THE CONSTITUTIONALITY OF IDAHO CODE §6-905.

Appellants argue that I. C. §6-905 is constitutionally infirm because it arbitrarily denies the "fundamental right" of access to the judicial process. They base their position upon an extrapolation of the court's holding in *Boddie v. Connecticut,* 401 U.S. 371 91 S. Ct. 780 (1971).

Appellants did not present to the Idaho courts an argument that the establishment of a class of persons with tort claims against the state falls into a category of a "suspect" class. The Idaho Supreme Court expressly held that the *Boddie* rationale did not apply because this was not a question of an inability to obtain access to the courts because of wealth. All persons have the ability to sue the state regardless of wealth or the lack thereof as long as they conform to the precedent statutory conditions. In other words, the *Boddie* holding dealt with a situation of an absolute limitation of judicial access whereas the Tort Claims Act provides a qualified access in an area where historically there was no access. Appellants' argument may very well be a basis upon which to challenge the existence of

complete sovereign immunity but is *not* applicable to a situation where governmental liability is reasonably qualified. In fact, the Court stated in *Boddie* that what the Constitution does require is "an opportunity", not that "access for all individuals to the courts is a right that is, in all circumstances, guaranteed . . ." 401 U. S. 382. Indeed, particularly in the area of access to the courts for civil litigation there is no absolute right to such access. In this regard, the courts have upheld the constitutionality of statute of limitations to cut off civil remedies. *Action Realty Co. v. Baker*, 420 F. 2d 1191 (7th Cir. 1970) cert. den 400 U.S. 821, 91 S. Ct. 40.

The right of an unqualified access to the judicial process for civil litigation has not been established as a "fundamental right". In this regard, an interesting analogy is the workmen's compensation area where the courts have repeatedly upheld the constitutionality of the classification between the non-employer tort-feasor and an employer tort-feasor and the inability of an employee to sue his employer for work-related personal injuries. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227; *New York Cent. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247 (1917).

The Idaho Supreme Court adopted and applied the proper equal protection test. A statute which creates classifications is not *per se* unconstitutional. *Stucki v. Loveland*, 495 P. 2d 571 (Id. 1972); *Evans v. Idaho State Tax Commission*, 501 P.2d 1054 (Id. 1972). In so holding, the Idaho Supreme Court has consistently applied the "two tier" equal protection analysis repeatedly approved by this Court. *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101 (1961); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973). This analysis was articulated by the Idaho Supreme Court as follows:

> " '*** the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it.' " *Newlan v. State, supra*, 1351; *McGowan v. Maryland, supra*, 425-426.

Thus, the Idaho courts properly applied the "minimal scrutiny test" since absolute civil judicial access is not a fundamental right and there is a reasonable factual basis commensurate with the purposes of I. C. §6-905. I. C. §6-905 applies uniformly to those who seek to sue a governmental entity within the State of Idaho. There are sufficient nonarbitrary and reasonable governmental interests in I. C. §6-905 to sustain its constitutionality.

IX.

CONCLUSION

For the aforegoing reasons and in light of the above authority, it is respectfully submitted that this Appeal

be dismissed or the Decision of the Supreme Court of the State of Idaho be affirmed.

DATED this ____ day of November, 1975.

Respectfully submitted,

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By _____
MICHAEL A. GREENE—Of the Firm

STATE OF IDAHO } ss. AFFIDAVIT
COUNTY OF ADA } OF SERVICE

Michael A. Greene, of the firm of EBERLE, BERLIN, KADING, TURNBOW & GILLESPIE, CHARTERED, being first duly sworn, deposes and certifies that on this ____ day of November, 1975, three copies of the Motion to Dismiss or Affirm by State of Idaho were mailed, postage prepaid, to Counsel for the Appellants at the following addresses.

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I further certify that all parties required to be served have been served.

Counsel for Respondent

_____

Subscribed and sworn to before me this ____ day of November, 1975.

_____

Notary Public for Idaho
Residence: Boise, Idaho